No. 14702

In the

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For the Ninth Circuit

ERICK I. RICHMAN,

Appellant,

vs.

TIDWELL, ROY E. HALLBERG, as Receiver l the real and personal property constituting former Richman Trust, and JOHN WHYTE, ney for Receiver,

Appellees.

TIDWELL,

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vs.

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CONSOLIDATED BRIEF ANSWERING ELLANT TIDWELL'S BRIEF AND REPLY TO PONDENTS' HALLBERG AND WHYTE BRIEF

BRADY, NOSSAMAN and WALKER
and
JOSEPH T. ENRIGHT

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Foreword

evity, and appellant Tidwell's conclusion (p. 38)
the order of the court settling the account of the

"Tidwell". Respondents Hallberg and Whyte w
referred to as "Receiver". In replying to Tidwe
pellant will again consider the appeal in the follo
order: I. Distribution of funds under the Settle
Agreement; and II. Fees. Thence, the respond
Hallberg and Whyte, who were required to be in
tial fiduciaries, charges of untrue, argument
statement of the case and argument, will be cate
cally answered.

I. Reply to Tidwell Brief.

A. The Settlement Contract and Acts of the Pa

Logical presentation prohibits, (if it is necess
answering Tidwell's unjustified assertions such
frequent assertions of fraud on the part of Rich
suffice it to say that the court in its Memorandum
cision (R. 5), made no mention of fraud on the pa
Richman, but stated (R. 5):

> "It now appears that plaintiff has made
> her case on her theory of undue influence in
> inception of the arrangement, and the only re
> for setting forth the limitations immediately a
> described is to explain to any reviewing court
> this case has been tried upon a limitatio
> described."; or remarks such as

"a nice 'fat' fee when we realize that the 10% fee
man seeks for the month of November, 1953, amo

. loss she sustained over a period of eight years
payment of exorbitant fees'' (p. 14), except to
observe that the premise to the Settlement Agree-
was " . . . , the court decision gave your
(Tidwell) what she was offered about two and
alf years ago before suit was filed, namely, a di-
of the trust'' (R. 139), and that during appel-
eight year management of the trust as agent its
increased from $375,000 to $1,200,000. (R. 603-
It is interesting to note that Tidwell makes no
ion to the Receiver's fees and expenses although
been shown (Op. Br. 42) that the Receiver's
nd expenses were greater than the fee of Richman
aid his own expenses. Also the expenses allowed
eceiver and his attorney are definitely contrary
court's own statement: (R. 188):

"It is noted that the total of receiver's and at-
rney's fees is approximately $2500.00 less than
ie fee which would have been enjoyed by de-
ndant while handling a like sum of money while
e was in charge."

pellant's Statement of Facts (Op. Br. pp. 4-14),
effort to accurately refer this court to the record
quote only portions of the agreement. The argu-
(pp. 54-59), has been challenged by Tidwell and
eceiver. The Receiver at pp. 18 and 19, as a part

the Receiver was not required to pick up from managers rents in the sum of $1290.59, collected be 5:00 p. m. on February 28, 1954.

An analysis of the following pages of Tidwell's b reveals that it is primarily concerned with the struction of this Contract: pp. 10-15—Appella claim against Richman Trust for his November s ices, being an operating obligation of the trust; pp 20—Tidwell's claims for escrow fees and rev stamps; pp. 23-36—Tidwell's claims for real prop taxes, utilities, and catalytic smog units payments her right to retain rents and petty cash.

Constructive analysis and a reply to Tidwell least inaccurate quotation (p. 11) of the Settle Agreement, justifies accurate quotation of at paragraphs 4 and 5, after observing the following. express conditions to the Settlement required parties to execute various documents, perform var acts, and assume certain obligations; they were:

1. Mutual releases conditioned upon the entire tlement being carried out;
2. Bear their expenses. (expenses whether of gation, the escrow or some other expense b undefined);
3. Dismiss the lawsuit with prejudice.
4. and 5. will be quoted.
6. Terminate the Trust.

escrow on or before May 1st. (Subject, of course, to paragraphs 4 and 5).
Tidwell required to elect on or before February 25th, and purchaser deliver the $100,000 by February 26th. (Tidwell elected to buy).
Parties execute whatever is necessary to carry out the terms of this arrangement.
Each party take such steps as he or she deems necessary to protect his or her legal position prior to May 1, 1954.

graphs 4 and 5 are are follows: (R. 140-141).

A stipulation shall be entered into that the receiver be relieved as of February 28, 1954, and whoever buys shall be entitled to all receipts and shall assume all operating obligations of the Richman Trust from March 1, 1954 on or until the re-appointment of a receiver as might occur under 7 (c) hereof. (Underscoring ours).
The receiver shall file his report and after the payment and/or provision for all of the receiver's claims and expenses and operating obligations of Richman Trust to February 28, 1954, any funds remaining shall be divided equally between Mrs. Tidwell and Mr. Richman." (Underscoring ours). (R. 140).

aragraph 4 specifies no hour at which the buyer

cuted (R. 54), which specified the time as being: "
o'clock p. m. Sunday, February 28, 1954", being
end of the month, when Tidwell would be entitle
"all receipts from March 1, 1954". It is apparent
the Receiver was to collect the "receipts until
p. m.", paragraph 5, which requiring him to report
after payment and/or provision for all of the (1)
ceiver's claims; and (2) Receiver's expenses; and
operating obligations of Richman Trust to Febru
28, any funds remaining shall be divided equ
between Mrs. Tidwell and Mr. Richman. When
further considers the Stipulation the parties exec
on February 26th (R. 54), the court Order pursu
to the Stipulation (R. 55), and the Escrow Instruct
executed on the same date by the parties and thei
torneys, it is more apparent. (R. 799). The Rece
argues (p. 18) that the petty cash funds in the hand
the managers, totaling $785.00, was being purch
by Tidwell, and the trial court, he argues, so de
mined. Thence the Receiver argues that the rents
lected by the managers before 5:00 p. m. were
capable of being retained or collected by him bec
"the banks were closed and he had no safe". Altho
safes were available in the apartment houses (R. 9
Further, he argues, "it appeared that these monies
resented payments by tenants in advance," there b
no evidence to support the assertion, (p. 19). Tid
argues that the Stipulation of the parties termina

e Receivers as of 5:00 o'clock Sunday, February
954", as the parties expressed themselves on the
ifferent occasions in the Stipulations, that: "these
es were interpreted by the Receiver and his at-
y to mean that he was only to keep money in any
account under his control." (p. 33). Such a con-
ion ignores the escrow instructions which pro-
there be no proration of rents. It ignores the
ic designation of 5:00 o'clock p. m., as being the
when the Receiver would cease to actively make
tions and obtain "receipts". It renders the words:
under the control of the said Receiver" of no
, since naturally a Receiver controlled the receiv-
bank account. Further, it ignores one of the
rs of the Stipulation own orally expressed inter-
ion of this Stipulation. This attorney, Mr. Wil-
P. Camusi stated, when arguing the question (R.
"It was conceded on all sides that all assets,
t money in the bank or under the control of the
ver at that time were to be turned over to the
iff, and they were turned over." The attorney's
ed concession is and has been the issue on these

. Appellant's November Fees.

dwell affirmatively seeks (p. 10) to deprive Rich-
of the reasonable value of his services fixed by

motion for new trial was pending and the trial c
stated it anticipated an appeal. She was not requ
to settle and neither party would thus have been
quired to execute the Mutual Release of each othe
dismiss with prejudice, as they were required to u
the terms of the Settlement. Tidwell's further e
is her assertion that Richman's claim was against
well for the value of his services or the agreed fee
der the terms of the trust. His claim was against R
man Trust only. Three distinct items were prov
for in paragraph 5 of the Settlement Agreement, w
were conditions to the dismissals and releases.
three items were: (1) Receiver's claims; (2) Recei
expenses; and (3) operating obligations of Rich
Trust to February 28, 1954. The only remaining T
or Receiver's obligations after the receiver had paid
$6,121.40 (Accounting R. 119) in accordance with
Sunday afternoon phone call by the receiver and
attorney to the trial judge (R. 427-934-935), were
Richman's agent's fee for November, 1953 set up
the Receiver in the amount of $3104.33 (R. 120)
the taxes. The escrow expressly provided no tax
ration. The smog control catalytic units did not bec
an obligation until they were accepted by the Los
geles smog authorities, which occurred March 9th
June 2nd, 1954. (R. 805). The receiver testified
he carried Richman's claim against the trust for
November services on the books as an obligation of

services for operating the trust were valuable to extent that during his tenure its assets increased a value of $375,000 to $1,200,000, and he should aid in accordance with paragraph 5 of the settle- contract out of the funds in the hands of the re- er, because the Trust contract and the value of his ices is an "operating obligation of Richman Trust" uing before February 28, 1954. The dismissal with udice was dated March 3, 1954 (R. 125), and the ual Release bears no date (R. 796), but each was ired by the Settlement agreement the same as the nent of this operating obligation of Richman Trust required.

C. Tidwell Escrow Fee and Revenue Stamps.

Tidwell asserts as errors 2 and 3 (p. 15) that she is led to escrow fees and revenue stamps. The as- on is made notwithstanding she and her attorneys arrying out the agreement signed the escrow in- ctions on the very day — February 26, 1954, in h she agreed (R. 799A):

"Notwithstanding the printed provisions in these nstructions, I agree to pay, in addition to the buy- er's costs and expenses in this escrow, all the seller's costs and expenses of this escrow and the cost of the policy of title insurance, revenue stamps and recording and filing all instruments and docu-

821) that the Settlement Agreement and the es
instructions must be construed together. She cite
authorities which were supplemented by appellant
additional authorities. All of her authorities she a
cites to this court at pp. 16 and 17. Of course, she
argues these authorities hold, and they do, that:
the absence of express conditions, custom deter
incidental matters relating to the opening of a
crow." Here there is no proof of custom and no
sion to consider custom because the express condit
to wit: no proration and no expenses, was specifi
stated in the escrow instructions. The agreemen
pressly stated each party bear his own expenses, r
ring to their expenses of the litigation which was
being settled. If there was any ambiguity in the S
ment Agreement or Sale Agreement, the Agree
was not "superseded" or the escrow did not "co
over" or "alter" or "amend", as Tidwell so frequ
inserts these words in her brief; rather, the Sale A
ment was specifically clarified and not modified b
escrow instructions. Richman, as seller, executed
delivered the documents required of him and thus
plied with the Agreement. The very next senten
the escrow instructions, immediately following the
quoted terms relative to Tidwell paying the se
costs and expenses, is the following: "These ins
tions are not intended to and do not amend, a
modilfy or supersede any agreement outside of es

the letter agreement heretofore mentioned, which
r agreement provided many things with which the
ow, as such, was not and could not be concerned;
1) mutual releases of all claims; 2) bearing their
expenses; 3) mutual dismissals with prejudice;
ipulation relative to the termination of the receiv-
p; 5) disposition of the funds in the hands of
receiver; and 6) termination of Richman Trust.
escrow concerned itself with the buying and selling
method of payment of the half interest of Richman
t as set forth in paragraph 7 of the Agreement.
obviously it was not the intent of the parties that
escrow should in any manner alter, amend, or
ge the requirements 1 to 6 contained in the Agree-
.

D. Utility Bills.

idwell argues and the trial court so held that the
ver failed to pay these bills in the sum of $1,877.50.
llant's Opening Brief (pp. 4-14) remains uncon-
cted that there has been no trial on the issues of
ies and tax proration in the amount of $4,952.77.
ell attempts to avoid the trial court's failure to
it a trial, or as the trial court once said, a hearing
re a Master (R. 842), by assertions on page 25 and
pages 27-28 based upon R. 790, 792, that the
es had stipulated upon these items. It will be noted

Counsel had previously stated concerning the ut bills in the amount of $1877.50: "the amount, I sure, is less than that amount." The utility and bills were never identified or received in evidence the trial court stated (R. 809), concerning utili taxes and catalytic units: "Well, it seems that you have some fact issues as to which evidence will be ne sary unless you get together on stipulations, w don't look too hopeful." The record here is that well never had these bills marked for identificatio have they ever been received in evidence. Later June 21st record shows (R. 817) that: "Mr. Pows I think we ought to have these while we discuss matter", referring to the utility bills. The hearing then adjourned.

The next proceeding occurred on September 1954, (R. 817-843). Again the parties argued the struction of the Sale Agreement and escrow inst tions. Again Tidwell (R. 836) stated she desire offer some utility bills in evidence. Objection a was made and it was pointed out (R. 837) appel would desire to present evidence if the utility bills v received in evidence and the court sustained the jection. Then the court stated (R. 837) in reply to well's further argument: "The Court: If on the n contention I should ultimately decide you were r we will refer the whole question to a Master for taking of evidence. Mr. Camusi: I see. The Co

ct to Richman being paid at least a reasonable fee use she had accepted the services and further: t to keep from having laches run against her, ldn't she find herself with what she had accepted?'' h this state of the record the court took the matter er submission. (R. 842).

oncerning these same utility bills, attention is di- ed to the Receiver's Accounting. It will be noted the Receiver paid each month utility bills for the apartment houses (R. 108, 110, 114) and in Febru- (R. 115) the utility items of ''water'', ''electric power'', ''gas'', ''telephone and telegraph'' in the unt of $1307.32. Further note, the Receiver's ex- ditures made in March totaling $6,121.40 which in- ed utility bill payments to the Department of er and Power, Pacific Telephone and Telegraph pany, and Southern California Gas Co., in the unt of $1329.05. (R. 119).

E. Catalytic Units.

Tidwell argues (pp. 30-32) that these units should harged against the Receiver's funds. She points (p. 31) that the Receiver could have had them in- ed in December, apparently acknowledging default he Receiver. Thence, that the units were not in- ed until after January 22nd. Payment did not be- an obligation of Richman Trust or the purchaser

quoted amount is required upon the execution of tract, balance of which is payable upon receipt o Los Angeles County Air Pollution District Perm operate''. The Permits were issued (R. 805) on M 9th and June 2nd, 1954. The purchaser, Tidwell, under the Settlement Agreement paragraph 4, titled to all receipts and shall assume all operatin ligations of Richman Trust from March 1, 195 . . .'' Uncertainty exists in the record as to the on which installation was completed. No uncerta exists as to the dates on which payment for these became an obligation. The permits were issue March 9th and June 2nd, 1954. Had the Richman T continued, payment for these obligations would then been required, but the parties expressly contra that the purchaser (Tidwell), pay this obligation cruing after March 1st.

There are many other contentions or remarks tained in the Tidwell brief, such as: (p. 30) that one of the contracts for the catalytic units was pl in evidence. This is erroneous but apparently printer failed to print both contracts. He made the (R. 803) ''(duplicate copy attached)'', which is no tirely correct because the contracts while identica provisions and terms varied, as to designation of ap ment house; and (p. 20) ''The trial court perm the Receiver to reimburse himself for the sum of $8 for copies of depositions paid by him. (Order of C

s, as determined by the trial court, or the net sum
m of $4,974.56. This fallacious accounting, evi-
ed by Tidwell's draft of the trial court Order and
pending motion to this court for an Order confirm-
he trial court's conditional ex parte Order, require
omment. Appellant relies upon his proposed dis-
ution of funds appearing (Op. Br. p. 66).

Reply to Receiver and His Attorney.

An effort will again be made to quote from this
minous record to demonstrate the unusual occur-
es and conduct in this receivership.

A. Receiver's Charge of Untrue Statements.

At pages 2 and 3 he asserts by conclusion, not only
uthfulness but incompleteness; thence he asserts
examples. Completeness requires a review of the
e record, and this is invited. Appellant can only
to the examples. The first is that the record was
sufficiently cited concerning the statements at the
of page 34 (Op. Br.), as to whether the Receiver
available to attend to a refrigeration breakdown
rring in February, 1954, in one of the large apart-
houses. The manager testified (R. 471-):

'I started trying to get in touch with Mr. Hall-
berg on the afternoons of the 17th, 18th, and 19th,
and was never able to contact Mr. Hallberg. About

The only diary entry of the Receiver and Miss
grove appears on the 19th: "To W A (Western A
Apartments) Re: Refrig." (R. 403A). At R. 472
manager explained she, on the 20th, after contac
appellant, employed another refrigeration compa

> "Then he (Hallberg), called me on the ph
> Q. On the morning of the 20th? A. Yes, I d
> know where he was, I just judged he was at
> office."

Thence the Receiver charges that several items
forth on page 42, Op. Br., as being a part of the
ceiver's accounting, are not a part of his Account.
first amount was a "salary expense item of $162
R. 410)." Bearing in mind this Receiver asserts spe
accounting experience it is difficult to see why
should charge untruthfulness unless it be for the
post of prejudicing appellant before this court.
the Receiver had to do to ascertain the $1628.18 sa
expense he incurred was to add the following items
salaries appearing in each one of his monthly item
tions of disbursements:—R. 110—$450.00 and $25
R. 114 — $450.00; R. 116 — $600.00; R. 119 — $10
totaling $1628.18, and each being designated in his
itemization as "salaries and wages", except the
being designated "Jean Findeisen—Office". The s
procedure for petty cash items.

Additional improper examples are: That ap

4). The record shows (R. 664) that Tidwell's at-
y stated as follows: "If they think, defendant
nan thinks he is entitled to any of this money, that
nething for the plaintiff and defendant to fight
n their lawsuit." The record from that point to
0 establishes that not only did the Receiver fail
port this refund in his accounting, but further,
ell admitted the right to a refund was "turned
to Mrs. Tidwell". Thence the court stated:

'Let's mark that down as one item to be considered
n the pretrial that is coming up."

ce, again at R. 671 the court directed:

'That is where I think we should consider it, in-
tead of considering it with this Receiver who was
ubject to an Order."

far as the Receiver is concerned it is an admitted
re on his part to acknowledge anywhere in his
nting that a refund was payable upon the $400.00
ported in his accounting as having been expended
m. (R. 113)

nother asserted untrue statement is: that the Re-
r intended to delegate his receivership duties to
Cosgrove (the maiden name of his wife), R. 380
correctly cited, it is as follows:

"A. I had intended to delegate the housekeep to Miss Cosgrove."

There is no uncertainty of the intent of Hallberg turn over the performance of the important recei ship duties to his wife when R. 380 is supplemented R. 433-4, where he admitted that he went out on Dec ber 1st, or during the first three days after the Deci of November 30th to appoint a receiver, and in duced Miss Cosgrove to the managers in the follow manner:

"Q. What did you tell the managers?

"A. I told them she was going to act for me.

See also R. 264-265, the Receiver's direct testim explanation of rendition of services by Miss Cosgr

The fiduciaries Hallberg and Whyte, as a Rece and an attorney, were supposed to be impartial in transaction. Their failure to so act is evidenced their improper charge of making untruthful st ments.

B. Receiver's Preliminary and General Stateme

This generalization of the facts (pp. 4-9), is s stantially correct except for the following conclusi

1. The Receiver and Whyte assume that the ceiver had a right to act by the Decision of

date appellant was pleading with the trial court
ix the amount of supersedeas bond which was
ed (R. 32, 216). Before qualifying they took over
ank account of the appellant, had collected monies
the managers of the five apartment houses and
ucted the managers to pay the rents to them (R.
54). The Trial Judge aided the Receiver's at-
ey, according to their records, (R. 555), in obtain-
Receiver's bond; thus, it is improper for the Re-
r and his attorney to claim fees from "December
953". 2. Whyte's conclusion that his time "was
ed to defending the Receiver against Richman's
k," appearing page 6, is likewise an improper con-
on. The Receiver had refused to state what com-
ation he desired, and all the acts, or non-action,
ut in the Opening Brief, had to be examined to
mine what fee, if any, he was entitled to receive.
ner, the attorney sought $3,000, plus extraordinary
in an undesignated amount. Is it proper for the
iver to now say that appellant forced him to de-
himself when appellant objected to certain items
s Account, after having sought to find out from
Receiver what fee he wanted, thence went forward
e Court's statement that all the facts should be
oped—to develop all the facts? 3. At pages 7 and
Receiver and his attorney assert there is no at-
t to surcharge the Receiver and, therefore, appel-

the amount of $785.00, the February rents in amount of $1290.59, the compensation insurance re in the amount of $158.00, the court having, in fact, charged the Receiver in the amount of $2027.25, b a premature payment by the Receiver on one of apartment houses; the condition being that t amounts be a charge against Tidwell's right to a por of the funds remaining in the hands of the Rece subject to their propriety being determined when if it became necessary for Tidwell and Richma litigate their Settlement Contract of February 19, 1 (R. 139-144). The Receiver's partial quotation 7-8), avoided stating the following:

> "Mr. Enright: I intend to and seek to charge Receiver personally and submit that the ch should be against the fund.
> "The Court: Well that means against the $30 which he still has in his possession. . . .
> "Mr. Enright: Could I have read? (The re read).
> "Mr. Enright: Certainly, Your Honor, I st that there is no need for this Receiver havin bring an action against the plaintiff to rec their money, that the plaintiff has received benefits of and added to the fund; rather, cha to the plaintiff." (R. 619)

Further, the Receiver failed to quote the portion of record (p. 685), appearing before Mr. Whyte's st

'Mr. Enright: I would merely point out the Court Order was that the Receiver retain monies under his control, the Order of February 26, 1954. This s an item of $1290.59 that he did not retain. I am oncluding the evidence on the point . Whether it s relevant or not, I can only state what the Court Order was." (Op. Br. pp. 49-54).

C. Receiver's Topical Statements of the Case.

a. Receivers Representations.

t pages 9 to 11 the Receiver argues that he merely chiming in" when he stated in reply to the Court's ments as to his experience and availability: "That rect". Appellant refers to his Opening Brief (pp.), which was and is an effort to state the record oting the record only. Appellant replies that he, ast, assumed the Court did not think that it was nting the wife of Mr. Hallberg to supervise five gers in the operation of 400 units contained in partment houses which the parties themselves by act agreed had a value of $1,200,000.00. (Settle- Agreement R. 141). In fact, apparently during the nged, intermittent hearings the Court was em- ssed as a result of its appointment, although it letely exonerated the Receiver in its ultimate De- s. For example, the Trial Judge volunteered dur- ne hearings, having failed to act upon the Petition

would involve, and I told him in a general
what it would be. I made the call because, altho
my acquaintance with him has not been person
very extensive, I have known him casually
was a neighbor of his, and I have known of p
erties that I thought he was managing for an a
relative. It turns out from the deposition tha
was his own property. I had known from just
ual conversation that he had had a responsible
in the management of considerable income p
erty in Chicago. I had thought for a term of ye
And it turns out now it was just a little over a y
if the deposition is right." (R. 257-258).

Long after the appointment and during the cours
the hearing, it was discovered that the Receiver's n
agement of apartment property was as follows: Du
the depression in 1930-31 he was employed by Gus
who was a bondholder of certain bonds issued
bank at Chicago. (R. 378). Secondly, as now
knowledged by the Receiver in His Brief (p. 16)

"About December, 1949, he and Mrs. Hallberg
chased a 16-unit apartment house in South P
dena which they held for approximately el
months and in which they installed Mrs. Hallbe
mother as manager."

As stated by appellant's counsel on November
when the Trial Court called counsel in to delive

assumed by Mr. Hallberg's statement: "That is
ct", that Mr. Hallberg was an experienced mana-
f Los Angeles area income property; that he did
ean that a place of business in Pasadena would
our-family flat rented to strangers.*

stated in the Opening Brief, if the representa-
made by the Receiver to his former neighbor, the
Judge, on the week before the Decision, (none of
appellant has been privileged to inquire concern-
nd which must be accepted upon the volunteered
nents of the Trial Judge), then at least the Re-
's hands are so unclean that they should be
lered when fixing his fees and do not justify a
$2,000 per month, when he was then expending a
ur work week as a permanent employee of the
y of Orange at a salary of $355.00 per month.

b. Petition to Disqualify.

e Receiver's Topical Statement is an argument
ot a statement of facts. Appellant here refers to
ening Brief pp. 22-23. The Court having closed
atter by failing to act and stating: "It is closed"
56), there is no justification for the Receiver to
the conclusion "it would have been wholly un-
ary" to call the Trial Judge as a witness. A liti-
who, according to the Trial Judge, has never
any trust funds (R. 212), and who is the half

owner of assets of $1,200,000, should be permitte
inquire into the circumstances surrounding the T
Judge who stated he would consider fixing supersed
bond (R. 216, 217, 31), but instead participated
obtaining a Receiver's bond (R. 555) to make effec
the appointment of one who represented to the Ju
he had acted as Receiver for years, had managed
tensive properties in the area of the $1,200,000 ass
and had a place of business, when each statement
at least an equivocation, if not a false statement.

c. Receiver's Availability and Earnings.

The Receiver, at page 12, now acknowledges
County of Orange, 40-hour week, 8 hours a day, M
day through Friday employment. This, he and
wife never disclosed to anyone (R. 526) before
termination of his active duties, or until deposi
proceeding after he filed his accounting. Thence
Receiver relies upon the volunteered statement of
Court (R. 258), that appellant had not devoted
entire time to the acting as agent for the Trust of
same properties, he being one of the Trustors, th
fore, the Receiver could take, we assume, full time
ployment at the County of Orange. The record
not justify such a volunteered position. The Rece
stated to the Court and it stated to the parties
the Court had interviewed Mr. Hallberg the v
before its November 30th decision and had been

previous application was employed to start full work for the County of Orange on Monday, De- r 7th. He should be compensated proportionately he basis of his earnings at the County of Orange, $355.00 per month (R. 328), or his immediately ing employment by Narmco Corp., a fishing pole facturer, at $350 per month (R. 364), or his Mor- onstruction Company drawing account of $100 from May to December, 1951. Perhaps consid- n should be given to the Receiver's assertions e had a salary of $10,000 a year in 1947 while ved by Refrigeration Corporation until "they to financial trouble back East" (R. 875), al- n he now states in his Brief: "About 1949 Hall- egan having trouble with his back—for months s in bed and in the hospital and accordingly his yment record from then until the time of the ership was spotty." (p. 15). But, yet we are doubt because he states (p. 16), that he spent months, commencing December, 1949, doing: physical work on the premises, including paint- arpeting, hanging doors, laying floor tile, and ing the roof" of the 16-unit apartment house he rs. Hallberg owned during the period. Further les of the Receiver's evasiveness when asked ning his qualifications by experience and previ- rnings are: the Receiver had explained that he

Gillian was "I know of him", he explained that he
a helper or gave aid in rendering services as an e
ciency expert. His assistance was organizing a gr
but:

> "at that time I was not capable of any sustai
> work.
>
> "The Court: You had some physical difficu
>
> "The Witness: Yes, I have been bothered
> several years with a bad back that incapacit
> me; over months on end I was in bed and the ti
> I got up were limited. I didn't do any phys
> work and I finally had an operation." (R.
> 367)

Secondly, the effort upon deposition of the Rece
and his attorney (R. 881) to not disclose the de
concerning the Receiver's County of Orange emp
ment, when he should have been himself attendin
the new duty of operating the apartment houses
taining 400 units. The trial judge criticized appel
stating the Receiver was treated like an "embezz
(R. 859). With such an admitted actual employ
record, appellant asserts no consideration should
given to the Receiver's claims that he made large
aries before 1951.

d. Receiver's Services.

The Receiver asserts he handled "the myriad p

y (R. 263-270), where he explains how he delegated problems involving the apartment houses; or to qualified admission on cross-examination of his ıtion to act as Receiver through Miss Cosgrove, vife, (R. 433-434) to determine how he performed trust of a receiver.

The Receiver, at page 17, asserts that he "set up w and improved bookkeeping system" (without a nal (R.274).) At another point the Receiver and ttorney attempt to explain why they were not able omply with the Court Rule requiring a Receiver ıake a report within 60 days. The sufficiency of "new" and whether they were "improved" books, ıbstantially answered at R. 46 where respondent te by Affidavit states why the accounting had not filed,—when seeking an extension of time.

"Affiant has been informed by Mr. Roy Harrison, said Receiver's bookkeeper, that said Harrison has had considerable difficulty in assembling the accounting data which must be included in said report, notwithstanding the fact that he has been working up the same for a number of days. Said Harrison has further informed this affiant that he will be unable to have said accounting data in final form prior to some time the week commencing January 31, 1954."

The Receiver admits that appellant charges
with violation of the Court Order terminating
active duties "5:00 o'clock p. m. Sunday, Februar
1954", having previously denied that the three i
of $785.00 petty cash, $1290.59 rents which the
ceiver's accounting reported as being $2,000 (R.
and prepayment of $2,027.25 to the benefit of Tid
and thence he attempts to justify his ex parte i
pretation of the Settlement Agreement on these it
He first states that petty cash in the possession o
managers was not money "under the control of the
Receiver", rather, it was an asset of Richman T
"and became the property of Mrs. Tidwell".
Court Order was that he terminate his active d
at 5:00 p.m. He did not take possession of
monies under his control, he states, "for the good
sufficienet reason that they were part of the wor
properties of the buildings". He fails to acknow
that he, in his accounting, charged himself (R.
with $785.00, being received, but before he termi
his active duties he issued checks all in February,
to the five different apartment house managers fo
following sums: $91.18, $95.73, $18.61, $54.81, $
(R. 115), to re-establish the petty cash fund of $78
These monies were drawn from the bank accoun

Reference is here made to the Reply to Tidv
Brief analyzing the Settlement Contract, the Es

re state the Receiver, by law, is required to be
rtial. The Receiver and his attorney admit that
e Sunday afternoon, after their golf game, they
l the Trial Judge by phone, advising him that
Enright and Tidwell's attorneys had disagreed
rning certain other expenses incurred in the oper-
of the receivership. (R. 428). An impartial Re-
r should have at least given appellant an oppor-
y to submit his position to the Court upon the
nishing of this petty cash fund and upon the other
involved in this appeal.

oncerning the rents collected by the managers
e 5:00 p.m. February 28th, at which hour he was
rminate his active duties, the Receiver asserts
8) he could not maintain his control over these
s or take possession of them because "the period
estion being a weekend the banks were closed."
Receiver justifies his failure to act until 5:00 p.m.,
ng the Trial Court decided, (Citing R. 182-183),
these rents belonged to the purchaser Mrs. Tid-
—he acted before this decision now on appeal.
ast the litigant was entitled to the Receiver con-
ng his active duties and collecting these monies,
he states he came to Los Angeles from Orange
ty on weekends, and this was a weekend, until the
Court decided the question. The Receiver,
ly justifies his payment of $2027.25, because it

that the Receiver had never previously prepaid t
installments; in fact, they were days delinquent.
ther light is thrown upon all these items by R.
which enumerates a great number of check stubs d
February 27th and 28th, by the Receiver, when he
performing his duties as Receiver on weekends
could have taken possession of the funds "under
control"; rather, obviously he intended to and
benefit Tidwell. The Receiver's conclusion that no
penny of the three items "was lost or dissipated
true insofar as Tidwell and the Receiver are concer
but to date they have been more than lost (appella
expenses in this proceeding considered), insofa
appellant is concerned.

e. Accounting Services and Experiences.

Appellant relies upon its Op. Br. pp. 32-34, the
missions in the Receiver's Brief, and other p
throughout this Reply.

f. Refrigeration Break-Down.

The Receiver, at page 21, in no manner attemp
refute his own testimony and diary which are qu
at page 34 Op. Br. Suffice it to again state tha
litigants were led to believe that a full-time court
ceiver had been appointed, who would be avai
each day to attend to emergency problems suc

ied she, upon discovering the problem, phoned Hallberg at the Orange County Assessor's Office hat she had not told anyone he could be reached . (R. 526).

g. Air Pollution—Criminal Citation.

ne Receiver asserts that "it is only necessary to the facts fully and accurately" (p. 21), in his to explain why these Contracts, executed before ualifying as Receiver on December 2nd, were not rmed until after February 1st. His statement 21-24), is substantially in accordance with appel- statement (pp. 35-37), except in two particulars. Receiver attempts to justify his nonaction because rrison having failed to carry out the instructions him about the first of the month", asserting: 3) "On January 22, 1954, Hallberg found the ings for the air pollution control equipment at his at the Oliver Cromwell". (R. 642). A reading of 2 reveals:

"The next time he (Harrison) was able to get in ouch with Mr. Hallberg was when he came to the ffice of the Receiver at the Oliver Cromwell on anuary 22nd. Mr. Hallberg went through his riefcase and found the Application and approved lans. That Mr. Hallberg then dictated the letter or Mr. Harrison to send to the Air Pollution Con-

The letter itself appears R. 646. Smog control was is a serious metropolitan Los Angeles problem. the Receiver been attending to the operation of t apartment houses each day, instead of Friday a noons and weekends such as this particular Jan 22nd, the smog control units could have been inst when the materials were available (R. 710), in De ber, provided, of course, the attorney for the Rec had reviewed the Contracts before December 3(being twenty-eight days after the Receiver qual Thence appellant would not now be resisting allow of attorneys' fees for services rendered to one o managers when she, with appellant, were charged a crime, because of the Receiver's neglect, in the Angeles Municipal Court.

h. Receiver's Fees.

At pages 24-28 the Receiver again relies upon Trial Judge's excusing his non-compliance wit local Rule 18(C), in an effort to reply to appell Statement of the Case (Op. Br. p. 37-43), then asserts that: "A licensed real estate broker and estate appraiser", (not a property manager) tes on direct examination that a 5% of gross income w be a reasonable fee. He does not deny that at R. 3 this same witness produced, on cross-examination Los Angeles Realty Board Schedule of Manage

's justification of the Receiver's fees which, g others, was that the Receiver was treated as h "he were accused of a crime". (R. 858). Ap- nt stands upon his Opening Brief statement and nent. Appellant asserts that the record will not y the Trial Court's criticism of mistreatment of eceiver, but that it will demonstrate a gross abuse scretion in allowing the fees that were allowed. reviously noted at the opening of this Brief, we spelled out for the Receiver and his attorney hey can trace the many expenditures made by the ver, as partially enumerated at page 42 of the ing Brief; and further, for example at R. 606-7. Receiver contends at page 27 that he should receive 0.00, or $2,000.00 a month, because Richman's fee gent would have been greater. Appellant was one e trustees and trustors. The facts are that ap- nt during the period 1946 until the receivership ased the trust assets from $375,000 to $1,200,000. 24). The law is that Receivers should be moder- compensated; are not entitled to be compensated the basis private industry compensates. We again from a Court of Appeals, as we did (Op. Br. 62): Supreme Court (U. S.) has given notice on more one occasion that Receivers and attorneys en- in the administration of estates in the courts of nited States and in litigation affecting property

(pp. 35-37) do not disagree with the Federal C
statement of the rule.

The Receiver's plea that he had the burden
task of taking possession of unknown properties
familiarizing himself with them, installing his sy
of management and setting up his books, and then
three months later being compelled to close the b
might have merit had the Receiver, in fact, perfo
these services instead of becoming a full-time emp
of Orange County. There is no evidence in the re
he closed his books, or ever rendered a report fro
books; rather, he filed an accounting which is a
lation of receipts and disbursements and it is in
plete (to the extent at least he thought that he
to collect rents of $2,000.00, which were in
$1290.59); it failed to reveal surrender of the
cash fund and the workmen's compensation de
refund to Tidwell, and, generally is a mere sched
of receipts and disbursements from a checkbook.

i. Objections to Receiver's Report.

Respondent-Receiver fails to answer the sp
charges (Op. Br. p. 43-44), pertaining to the Rece
Report. By Footnote 7, he again by conclusion as
"The inaccuracies and unreliability of his (a
lant's) brief." This conflict can best be resolv
a reading of the Receiver's Report commencing

all acts, were performed by Miss Cosgrove. (R. 70). The specific assertion of inaccuracies and iability refers to the $158.00 refund upon the 00 workmen's compensation insurance deposit. er the Report or Accounting anywhere makes ref- e to this asset which the Receiver, ex parte, deter- d was an asset of the purchaser Tidwell. Tidwell's el asserted (R. 670-671), the refund was turned to Tidwell. The amount was uncertain at the time e filing of the accounting but, the least the Re- could have done was to report and account for being an undetermined refund. That he failed to is likewise can only be ascertained by an examina- of his Report and his Schedules of receipts and rsements.

j. Attorney's Fees.

ne Receiver asserts (pp. 29-33), appellant "does hallenge as reasonable the fee of $1800.00". A ng of Specification 7 (Op. Br. 48), Statement of s, (Op. Br. pp. 44-46), and Summary—one sen- argument (p. 66), will demonstrate the impro- y of the contention. Again, attorney Whyte asserts as "defending the Receiver" (and apparently lf), after appellant objected to a $3,000.00 attor- fee, plus extraordinary, and objected to the ac- ing items especially those heretofore frequently

after the Receiver had refused to state what fe
would consider reasonable. As pointed out in the C
ing Brief, this Receiver and his attorney were fi
aries who were required to fully disclose and carr
burden of explaining their Account and justifyin
fees they sought. As to whether the attorney is en
to be compensated for expending his time in goin
with the Receiver to take possession of the apart
houses and taking over the bank account, before c
fying, aiding in the accounting, and many other al
services may *de novo* and originally be determin
this court. In *Campbell v. Green,* 112 F. 2d 143
rule was stated concerning the power of the Cou
Appeal concerning attorney fees:

> "The court, either trial or appellate, is itse
> expert on the question and may consider its
> knowledge and experience concerning reaso
> and proper fees and *may form an indepe*
> *judgment either with or without the aid of*
> *mony of witnesses as to value.* (Emphasis ad
> Citing C.J.S. Attorney & Client, Sec. 191(d)

Other Federal court decisions following the
are: *Mercantile Commerce Bank & Trust Co. v. S*
east Arkansas Levee Dist., 8 Cir., 106 F. 2d 966;
chants' & Manufacturers' Securities Company v.
son, 8 Cir., 69 F. 2d. 940; *Blackhurst v. Johnson,* 8
72 F. 2d. 644; *Federal Oil Marketing Corporat*

ppellant submits that even the original $1,000.00
ance of the Trial Judge is excessive, the nature
manner of performance of services rendered by
torney for this Receiver, this whole record con-
d.

Conclusion

e clear, apparent and obvious errors of the Trial
's construction of the Settlement Agreement,
it had stated, at an adjourned pretrial hearing
ptember 27, 1954, that if it changed its ruling as
admission of evidence, it would appoint a Master
eive evidence, forces appellant to charge gross
of judicial discretion by the Trial Court through-
is proceeding. Appellant, whom the Trial Court
ed to as "a very well educated and capable law-
(R. 8), and his counsel, have never observed such
of judicial discretion. Their concept of judicial
tion is as set forth in *Langnes v. Green,* 282 U. S.
41; 51 S. Ct. 243; 75 L. Ed. 520, 526:

"The term 'discretion' denotes the absence of
hard and fast rule. The *Styria v. Morgan,* 186
. S. 1, 9, 46 L. ed. 1027, 1033, 22 S. Ct. 731.
When invoked as a guide to judicial action it
eans a sound discretion, that is to say, a discre-
on exercised not arbitrarily or wilfully, but with

From the inception of the receivership the
Judge arbitrarily exercised his discretion. He re
to fix the amount of supersedeas bond, rathe
directed the proposed attorney of the Receiver
had then been unable to post his bond), to advis
bonding company to write the Receiver's bond
the premium would be paid out of the estate. S
sedeas is discretionary but the discretion must n
arbitrary. Here, the extraordinary remedy o
ceivership was imposed upon a successful memb
the Bar, who had also successfully engaged in
business ventures; who was a half owner of the
and as Agent for the Trust had, during his ag
substantially increased the Trust's assets and wh
admittedly not appropriated any trust funds a
most, was charged with obtaining an undue adva
because of his fees. In sequence, the Trial Judg
tended the Receiver's time to comply with the
court rules for filing his Report; the Trial Judg
structed the Receiver, contrary to long establ
local rule, to ask for a reasonable fee. After the R
was filed and when appellant questioned the co
ness of the representations, the Trial Judge state
been made to him before the Receiver was appo
and after appellant had objected to the Report be
of the various benefits the Receiver had perm
Tidwell to obtain, the Trial Judge advised appe
"No evidence will be taken concerning the ap

ver when it became necessary to establish the pertaining to the Receiver's experience, qualifi- ns, previous rate of compensation, and truthful- of his representations. At the inception of the edings (R. 256), the Trial Judge asked appel- counsel: "What do you think is reasonable, Enright?" After counsel explained the events caused him difficulty in suggesting a fee, the Judge stated: (R. 261) "We had better take vidence on what he (Receiver) did." Appellant esired to avoid such extensive hearings and short- ereafter counsel (R. 265-267), proposed a fee ht to be reasonable. Long thereafter, when the were being developed, the Court suggested to el that a career should not be made out of the and the Receiver was asked what fee he would der reasonable (R. 416), and he replied he would pon the Court to fix his fee. The facts pertain- the representations made by the Receiver to the Judge were only partially developed because the Judge failed to rule on the Petition to Disqualify, he was a witness to the representations. There conflict in the evidence as to the Receiver's earn- apacity at the time he qualified by posting bond aking the oath to act as Receiver. His salary as ployee of the County of Orange, Assessor's Office full work week was $355.00 per month. Imme-

his discretion when he awarded the Receiver a $6,
fee for less than three months services. Yet the
Judge states in explanation of such order (R.

> "Mr. Hallberg asked for less than he got
> the court. I increased, not the prayer of his
> tion, but the tenor of his testimony, because
> that he had not given any account to the el
> of having to account so fully in court, as well
> the accounting which he had prepared and f

The Trial Judge then discloses what appears
his personal prejudices when he states (R. 859
the Receiver was treated like an embezzler; an
863) that this Receiver would not care to act a
ceiver again because of the "criticism and acr
which attends being a receiver".

There is an absence of what would be " . . .
table under the circumstances and the law, .
within the *Langnes v. Green* definition of disc
in the November 19, 1954 Order of the Trial
fixing fees and directing distribution of the fun
maining in the hands of the Receiver. This is lik
true of the *ex parte* conditional Order made b
Trial Judge on September 9, 1955, which we no
derstand has been approved by this Court. If
possible to reconcile the addition of the Septem
1955 accounting procedure Order with the rema
of the November 19, 1954 Order, such reconcil

ed to the amounts specified in the September 9, Order.

e discretion of the Trial Judge was improper ning the construction of the Settlement Agree- nd division of the funds in the hands of the Re- for the following reasons: The Court improp- 1) awards Tidwell the $785.00 petty cash funds ceiver had under his control; 2) awards Tidwell nts collected by the Receiver's managers before .m. on February 28, 1954 in the amount of 59; 3) awards Tidwell a compensation refund amount of $158.00; 4) awards Tidwell one-half lities in the amount of $1877.50; taxes in the t of $4,952.77; catalytic smog units in the t of $2600.00, or a net to Tidwell of $4715.13. ourt once exercised its discretion before decision ting evidence could not be received concerning s and taxes, because Tidwell was bound by the n agreement and escrow carrying it out, and then if it changed its mind it would appoint a Master evidence. To construe the Settlement Agree- Stipulations, and Escrow Instructions of the in such a manner was a gross error of law and portable by the "the reason and conscience of dge", as those words are used in *Langnes v.* The Court further had no jurisdiction or power strue the Contract except for the purpose of

before the Court except to the extent the Receive
self *ex parte* construed and acted under the Co
when leaving the insurance refund, petty cash
and the rents for Tidwell's agent Udall to obtai

Appellant prays that the Order and Judgm
the Trial Court dated November 19, 1954, as
tionally modified by the Order of September 9
be reversed; that this court determine that the
ment Contract of the parties requires the cond
surcharging of the Receiver, in accordance wi
accounting set forth on pages 66, 67 and 68 of
lant's Opening Brief; and that this Court f
amount of fees payable to the Receiver and the a
payable to the attorney for the Receiver, both
be subject to the costs incurred by appellant upo
appeal.

Dated: October 4, 1955.

Respectfully submitted,
BRADY, NOSSAMAN and WALK
and
JOSEPH T. ENRIGHT
By: JOSEPH T. ENRIGHT
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